Supreme Court, U.S.

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No. _____

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In The

Supreme Court of the United States

October Term, 1996

DAVID JOHN DIERSEN,

Petitioner,

v.

CHICAGO CAR EXCHANGE, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

According to cases decided under the Federal Odometer Act (the Act), there was intent to defraud if a dealer certified a car's mileage without investigating its mileage history when there were sufficient material facts to make the dealer suspicious of the mileage claim. In this case, the respondent, a collector car dealer, certified that a car had been driven only 22,633 miles without investigating its mileage history even though the car was 26 years old, it had a worn driver's seat, it had been extensively restored, no maintenance or repair receipts existed to support the mileage claim, etc. A minimal mileage investigation would have disclosed that it had been driven at least 75,000 miles according to prior title documents. Relying on a 1988 Department of Transportation (DOT) regulation that exempted cars over 10 years old from the Act, the District Court granted the respondent summary judgment even though the petitioner's discovery had not been completed.

On appeal, the Seventh Circuit invalidated DOT's old car exemption because the Act does not include any exemptions and the Act has not been amended to give DOT authority to grant any exemptions. However, the Seventh Circuit granted the respondent summary judgment on other grounds concluding that a jury would find that the respondent was not more than merely negligent when it failed to investigate the car's mileage history. It did this without acknowledging or addressing the bulk of the material facts that favored the petitioner's argument that the respondent should have been suspicious and notwithstanding the District Court Magistrate Judge's

QUESTIONS PRESENTED – Continued

subsequent statements and conclusions favoring the petitioner. Finally, on May 28, 1997, relying on a section in its 1997 appropriations act, DOT rejected the Seventh Circuit's invalidation of the old car exemption. The five questions presented here are:

1. Whether the Seventh Circuit's decision concerning the intent to defraud issue conflicts with other decisions, conflicts with the intent of the Act, hinders enforcement of the Act, or harms odometer fraud victims' rights under the Act.

2. Whether the Seventh Circuit misapplied the Seventh Amendment to the United States Constitution or the Federal Rules of Civil Procedure concerning the right to a jury trial.

3. Whether the Seventh Circuit's affirmation of summary judgment on other grounds departed from the accepted and usual course of judicial proceedings.

4. Whether the Seventh Circuit made erroneous factual findings and credibility determinations to develop the record concerning the intent to defraud issue.

5. Whether it was improper for DOT to reject the Seventh Circuit's finding that the old car exemption is invalid.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David J. Diersen ("Diersen") respectfully asks that this Court issue a writ of certiorari to review the decision the Seventh Circuit entered in this proceeding on March 31, 1997. While Diersen is not an attorney, he has been a certified public accountant in Illinois since 1979, a licensed CPA in Illinois since 1982, and a Certified Fraud Examiner since 1990. Diersen is *Pro Se* in this matter because of the extremely high cost of attorney fees and because the District Court allowed his former attorney to withdraw. However, if this Court grants Diersen a writ, Diersen will retain an attorney admitted to practice before this Court to represent him.

JUDGMENT AND OPINION BELOW

The decision of the Seventh Circuit that gives rise to this petition is in Appendix A at page A-1. The May 13, 1997 Order of the Seventh Circuit denying Diersen's April 14, 1997 Petition for Rehearing is Appendix B at page A-18.

JURISDICTION

The basis for this Court's jurisdiction is the Seventh Circuit's March 31, 1997 decision and its May 13, 1997 Order denying Diersen's April 14, 1997 Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Seventh Amendment to the United States Constitution: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure, Rule 12(c) in relevant part: Concerning motions for judgment on the pleadings, "All parties shall be given reasonable opportunities to present all materials made pertinent to such a motion by Rule 56."

Federal Rules of Civil Procedure, Rule 38(a): **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States shall be preserved to the parties inviolate.

Federal Rules of Civil Procedure, Rule 56(c) in relevant part: Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."

Vehicle Information and Cost Savings Act ("the Federal Odometer Act" or "the Act"), Title 49 U.S.C. CHAPTER 327 (formerly 15 U.S.C. Section 1981 et seq.).

Section 32701. Findings and purposes

(a) FINDINGS. – Congress finds that –

(1) buyers of motor vehicles rely heavily on the odometer reading as an index of the condition and value of a vehicle;

(2) buyers are entitled to rely on the odometer reading as an accurate indication of the mileage of the vehicle;

(3) an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle; and

(4) motor vehicles move in, or affect, interstate and foreign commerce.

(b) PURPOSES. – The purposes of this chapter are –

(1) to prohibit tampering with motor vehicle odometers; and

(2) to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers.

Section 32705. Disclosure requirements on transfer of motor vehicles, in relevant part:

(a) WRITTEN DISCLOSURE REQUIREMENTS. –

(1) Under regulations prescribed by the Secretary of Transportation, a person transferring ownership of a motor vehicle shall give the transferee a written disclosure –

(A) of the cumulative mileage registered by the odometer; or

(B) that the mileage is unknown if the transferor knows that the mileage registered by the odometer is incorrect.

(2) A person making a written disclosure required by a regulation prescribed under paragraph (1) of this subsection may not make a false statement in the disclosure.

* * *

(4) The regulations prescribed by the Secretary shall provide the way in which information is disclosed and retained under this section.

Section 32710. Civil actions by private persons:

(a) VIOLATION AND AMOUNT OF DAMAGES. – A person that violates this chapter or regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater.

(b) CIVIL ACTIONS. – A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction. The action must be brought not later than 2 years after the claim accrues. The court shall award

costs and a reasonable attorney's fee to the person when a judgment is entered for that person.

Odometer Disclosure Requirements, 49 C.F.R. Section 580.6, Exemptions, in relevant part:

> (a) A transferor or lessee of any of the following motor vehicles need not disclose the vehicle's odometer mileage:
>
> (1) A vehicle having a Gross Vehicle Weight Rating, as defined in Section 571.3 of this title, of more than 16,000 pounds;
>
> * * *
>
> (3) A vehicle that is ten years old or older; or
>
> * * *
>
> (b) A transferor of a new vehicle prior to its first transfer for purposes other than resale need not disclose the vehicle's odometer mileage.

1997 DOT Related Agencies Appropriations Act, Public Law 104-205 (Sept. 30, 1996), Section 332: "Notwithstanding any other provisions of law, the Secretary may use funds appropriated under this Act, or any other subsequent Act, to administer and implement the exemption provisions of 49 CFR 580.6 and to adopt or amend exemptions from the disclosure requirements of any class or category of vehicles that the Secretary deems appropriate."

STATEMENT OF CASE

According to cases decided under the Federal Odometer Act (the Act), there was intent to defraud if a dealer certified a car's mileage without investigating its mileage history when there were sufficient material facts to make the dealer suspicious of the mileage claim.

In July 1994, the respondent, the Chicago Car Exchange, Inc. (CCE), a large profitable car dealer that has specialized in selling expensive classic, antique, and

collector cars since 1989, certified in writing to Diersen that a 1968 Dodge Charger R/T had been driven only 22,633 miles without investigating its mileage history. Relying on CCE's mileage certification and CCE's claim that the car had only two owners prior to CCE, Diersen paid CCE $16,790 for the car plus sales tax and title and license fees. CCE certified the car's extremely low mileage without investigating its mileage history even though it was 26 years old; it had a worn driver's seat; CCE knew that extensive mechanical, rust, and body restoration work had been done; CCE had not received any documentation to support the claimed mileage other than the car's title; CCE obtained the car for only about half its wholesale value; CCE had no prior business dealings with the individual it purchased the car from; none of the car's tires or its spare were original; the speedometer clicked and made grinding noises; the tachometer significantly overstated engine speed; many trim parts had been severely pitted and re-chromed; and its oil pan was dented.

During August and September 1994, Diersen spent $2,600 on the car in improvements and repairs. In October 1994, Diersen learned from titles and title applications provided by the Illinois Secretary of State that the car had at least four owners prior to CCE and it had been driven at least 75,000 miles as of 1983. Diersen spoke to the prior owners who claimed that the 22,600 mileage figure was correct and that the 75,000 mileage figure shown on two titles and three title applications were "clerical errors." But none of the prior owners provided Diersen any documentation to support their low mileage claims. The car's second and third titles showed 75,000 miles. However, the car's third and fourth owners of record had certified that the car had been driven only 22,000 miles as of July 12, 1985 and without questioning the mileage discrepancy, the Illinois Secretary of State simply issued the fourth title showing 22,000 miles.

Diersen had the car professionally appraised and learned that it was worth $7,000 less because of the mileage discrepancy. Through an attorney, Diersen asked CCE to either pay him the $7,000 loss in the car's value or agree in writing to buy the car back for what it would be worth if no mileage discrepancy existed. While CCE indicated that it would take return of the car and refund Diersen what he had paid CCE, CCE refused to put anything in writing and CCE refused to discuss the $2,600 that Diersen had invested in the car.

In April 1995, with full knowledge of the prior owner's "clerical error" explanation for the mileage discrepancy, attorney Daniel A. Edelman (Edelman), filed suit in District Court under Section 32710 of the Act on a contingency fee basis charging CCE with intentionally providing Diersen with an inaccurate mileage certification in violation of Section 32705 of the Act to induce Diersen to pay CCE more for the car. Edelman would not agree to name as co-defendants any of the car's prior owners, CCE's president, or the CCE salesman that Diersen dealt with.

On September 27, 1995, Edelman advised Diersen by phone that he wanted to withdraw because the prior owners continued to maintain their "clerical error" explanation for the mileage discrepancy and they had not provided evidence that the car had been driven more than 22,600 miles. Diersen asked Edelman to reconsider and pointing out to him that the prior owners had not provided any documentation to support their "clerical error" explanation or their low mile claims. In addition, Diersen pointed out that Edelman had not deposed the CCE salesman that Diersen dealt with, the car's first owner, or the individual who had possession of the car for a substantial period of time between the first and second owners of record. Edelman had not deposed as adverse parties CCE's president or the car's second, third, and fourth owners of record. Edelman had not

asked CCE if, when it certified the car's mileage, it knew that it was not required to do so because of the "old car exemption," the 1988 National Highway Traffic Safety Administration (NHTSA) regulation 49 CFR 580.6(a)(3). Finally, Edelman had not sought facts to prove or infer that CCE knew of the old car exemption. The record shows that on September 30, 1995, October 9, 1995, and October 16, 1995, Diersen requested Edelman in writing to seek an extension of time for discovery, but Edelman failed to do so. On October 17, 1995, Edelman filed a motion for leave to withdraw. On November 27, 1995, the District Court granted Edelman's motion for withdrawal and gave Diersen until December 14, 1995 to respond to CCE's motion for summary judgment.

On December 21, 1995, the District Court relied on *Smith v. Walt Bennett Ford, Inc.*, 864 S.W.2d 817 (Ark. 1993) and granted CCE summary judgment based on assumptions that the old car exemption was valid and that CCE had not knowingly waived its right to not certify the car's mileage. In response to Diersen's motion for reconsideration, CCE argued that it had not known of the old car exemption and that it had not knowingly waived its right to not certify the car's mileage. Diersen submitted many material facts that evidenced that CCE either knew or should have known of the old car exemption, but the District Court accepted CCE's argument that it was ignorant of the old car exemption.

The District Court, knowing that Diersen's discovery was not complete, granted CCE summary judgment without considering the sufficiency of Diersen's evidence that CCE had provided Diersen with an inaccurate 22,600 mile odometer statement with intent to defraud and that CCE had not made Diersen a valid refund offer. However, subsequent to its grant of summary judgment, the District Court Magistrate Judge recommended denial of CCE's $10,000 motion for sanctions that charged Diersen with

filing a frivolous suit. The record shows that the Magistrate Judge made statements and reached conclusions that the car had been driven 75,000 miles and that Diersen had introduced sufficient evidence for a jury to decide if CCE intended to defraud.

On appeal, as Diersen understands it, the Seventh Circuit overturned *Smith* concerning NHTSA's exemptions and concluded that certifying a motor vehicle's mileage brings the transaction under the Act irrespective of (a) NHTSA's exemptions, (b) the seller's knowledge or lack of knowledge of NHTSA's exemptions, or (c) the validity or invalidity of NHTSA's exemptions. In addition, relying on many cases including the 1994 Ninth Circuit decision in *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433 which invalidated NHTSA's heavy truck exemption, the Seventh Circuit invalidated the old car exemption stating that the District Court had "erred in relying upon this exemption when it granted summary judgment to the CCE." However, relying solely on its 1992 decision in *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, the Seventh Circuit concluded that its task was to review the record and controlling law de novo. The Seventh Circuit then went on to make the following initial factual findings and credibility determinations to develop the record:

- CCE had "concluded that the car was in good condition and did not suspect that the odometer reading was inaccurate" and "CCE's own inspection of the vehicle did not suggest that the 22,600 mile figure was inaccurate or erroneous;"
- Diersen's subsequent investigation of the car's title history was "extensive;"
- CCE made a valid refund offer, Diersen "refused" that offer, and Diersen's "allegation of fraudulent or evil intent is belied by the fact that the CCE, in good faith, offered

to allow Diersen to return the car for full refund of his money (an offer which Diersen rejected, preferring to pursue this lawsuit);"

- a jury might believe the prior owners' "clerical error" explanation for the 75,000 mileage shown on two prior titles and three prior title applications rather than the testimony that Diersen's expert witness could give that the car had been driven "greatly in excess of 22,600 miles;"
- CCE was not more than merely negligent when it (a) ignored the car's unusually low claimed mileage in relation to its age, the "worn condition of the driver's seat," and the "damaged condition of the vehicle's oil pan;" (b) did not conduct "further inquiry into the car's mileage;" and (c) relied on the 22,600 mileage claim made by the individual it purchased the car from; and
- "there is, in short, no evidence to suggest that CCE knew or suspected that the 22,600 mile figure was mistaken, much less that it intended to defraud Diersen by providing an inaccurate odometer reading" and "Diersen has not introduced any evidence showing that the CCE acted with intent to defraud" and there was "insufficient evidence upon which to base a finding of odometer fraud."

Relying on the above initial factual findings and credibility determinations and only one other decision – its 1988 decision in *Jones v. Hanley Dawson Cadillac*, 848 F.2d 803 – the Seventh Circuit affirmed the District Court grant of summary judgment on other grounds. The Seventh Circuit did this without acknowledging or addressing (a) the bulk of the material facts that favored Diersen's argument that CCE should have been suspicious of the car's claimed mileage, (b) the District Court

Magistrate Judge's subsequent statements and conclusions favoring Diersen, or (c) the fact that discovery was not complete. The Seventh Circuit decided that "a rational jury could not find in Diersen's favor with respect to the CCE's alleged intent to defraud, a crucial element of Diersen's claim."

In his April 14, 1997 Petition for Rehearing, Diersen pointed out that in *Jones v. Hanley Dawson Cadillac*, the only fact the plaintiff could find to prove that the dealer should have been suspicious was a very minor one – a missing turn signal lens. In addition, Diersen pointed out that in this case, many additional important material facts were in the record that the Seventh Circuit had not acknowledged or addressed in its opinion that evidenced that CCE should have been suspicious of the mileage claim. For example, CCE knew that extensive mechanical, rust, and body restoration work had been done; CCE did not receive any documentation to support the claimed mileage other than the car's title; CCE obtained the car for only about half its wholesale value; CCE had no prior business dealings with the individual it purchased the car from; none of the car's tires or its spare were original; the speedometer clicked and made grinding noises; the tachometer significantly overstated engine speed; and many trim parts had been severely pitted and re-chromed. Diersen argued in his petition that taken as a whole, these facts would have made CCE and any other dealer suspicious of the mileage claim and would have prompted them to investigate the car's mileage history.

In his petition, Diersen also cited additional material facts in the record that the Seventh Circuit did not acknowledge or address in its opinion. For example, CCE is a large profitable car dealer that had specialized in selling expensive classic, antique, and collector cars since 1989; CCE refused Diersen's request to put its purported refund offer in writing; Edelman failed to depose the car's first owner, the individual who had possession of

the car for a substantial period of time between the first and second owner of record, and the CCE salesman Diersen dealt with; Edelman failed to depose as adverse parties CCE's president and the car's second, third, or fourth owner of record; and the Magistrate Judge had subsequently made statements and reached conclusions favoring Diersen.

Finally, on May 28, 1997, relying on Section 332 in its 1997 appropriations act, Public Law 104-205 (Sept. 30, 1996), DOT, acting through NHTSA, sent a letter (Appendix C, A-19) to the American Association of Motor Vehicle Administrators and posted it on NHTSA's World Wide Web internet site. In that letter, DOT announced that it was rejecting that part of the Seventh Circuit's decision that invalidated NHTSA's old car exemption and that it was going to "publish a final rule repromulgating all of the exemptions currently contained in 49 CFR 580.6;" that it was going to "make this final rule effective immediately upon publication in the *Federal Register*; and that it was going to "post the *Federal Register* notice and other relevant information on its World Wide Web site."

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT DECISION CONCERNING THE INTENT TO DEFRAUD ISSUE CREATES AN INTOLERABLE CONFLICT WITH OTHER DECISIONS, IT DIRECTLY CONFLICTS WITH THE INTENT OF THE ACT, IT SEVERELY HINDERS ENFORCEMENT OF THE ACT, AND IT SEVERELY HARMS ODOMETER FRAUD VICTIMS' RIGHTS UNDER THE ACT

According to many cases decided under the Act, dealers are charged with having a greater knowledge of the Act than non-dealers and as a result, when a dealer violates the Act, a presumption exists that the violation was committed with intent to defraud. According to these

cases, dealers are required to affirmatively look for evidence that odometer statements are false and if the dealer has reason to be suspicious of a car's claimed mileage, it must do more than test drive and visually inspect the car, it must conduct a mileage investigation. This investigation would typically include, at a minimum, obtaining prior title documents and/or contacting prior owners.

Conflicts With Other Decisions The Seventh Circuit's decision in *Diersen* creates an intolerable conflict with many other cases decided under the Act. For example, it conflicts with *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978) and *Haynes v. Manning*, 917 F.2d 450 (10th Cir. 1990) because in those cases, the courts found that a dealer is not entitled to rely on an odometer statement as a matter of law and that blind reliance on a transferor's statement in the face of evidence suggesting inaccuracy is not permitted. In *Diersen*, the Seventh Circuit found that CCE was not more than merely negligent when it relied on the mileage claim made by the individual it purchased the car from in the face of the evidence suggesting inaccuracy.

The *Diersen* decision conflicts with *Nieto*; *Adams v. Neil Huffman Nissan, Inc.*, 1989 Ky.App. LEXIS 51 (1989); *Ragland v. Dumm*, 1994 Ohio App. LEXIS 6030 (1994); and *Auto Sport Motors, Inc. v. Bruno Auto Dealers, Inc. and Brielle Motors, Inc.*, 721 F.Supp. 63 (S.D.N.Y. 1989) because in those cases, the courts found that a dealer should be suspicious if a car's claimed mileage is unusually low in relation to its age. These courts found that the following mileage claims, although not necessarily by themselves alone, should have made the dealers suspicious: 14,736 miles on a 10-year-old truck in *Nieto*; 33,000 miles on a 6-year-old car in *Adams*; 27,000 miles on a 6-year-old car in *Ragland*; and 29,771 miles on a 2-year-old car in *Auto Sport Motors*. According to court in *Auto Sport Motors*, "Circumstances giving rise to a duty to inquire include unreasonably low mileage in relation to the year of the

car, the condition of the tires and the condition of the interior and exterior of the car." In *Diersen*, the mileage claim was 22,600 miles on a 26-year-old car and many other material facts suggested inaccuracy including a worn driver's seat. It is well known that many collector car buyers will pay a premium for low mileage cars. CCE argued in its response to Diersen's petition for rehearing that dealers like CCE that specialize in selling collector cars should not be expected to be suspicious of low mileage claims because they see so many such claims that they are no longer "surprised." Accepting such an argument would give dealers like CCE a license to engage in odometer fraud. Diersen argues that dealers like CCE should be held to a higher standard to detect odometer discrepancies because they routinely buy and sell old cars with low mileage claims.

The *Diersen* decision conflicts with *S&S Toyota, Inc. v. Kirby*, 649 So. 2d 916 (Fla. Dist. Ct. App. 1995) and *Heffler v. Joe Bells Auto and John Kennedy Ford*, 946 F. Supp. 348, LEXIS 16061 (Penn. 1996) because in those cases the courts found that a worn drivers seat should have made the dealer suspicious. In *Diersen*, the driver's seat was worn.

The *Diersen* decision conflicts with *Ragland*, and *Levine v. Parks Chevrolet, Inc.*, 76 N.C.App. 44, 331 S.E.2d 747, 751 (1985) because in those cases, the courts found that several pieces of equipment, most noticeably the tires, not being of the original brand should have made the dealer suspicious. In *Diersen*, virtually all the car's original mechanical parts had been replaced, including its tires and spare.

The *Diersen* decision conflicts with *Oettinger v. Lakeview Motors, Inc.*, 675 F.Supp. 1488 (E.D. Va. 1988) because in that case, the court found that to make affirmative claims about mileage without knowledge is either intentionally deceitful or reckless. In *Diersen*, CCE made affirmative claims about the car's mileage even though the

individual that CCE bought the car from presented no documentation such as (a) maintenance, repair, or restoration receipts, (b) emissions testing documents, or (c) insurance records that showed that the car had been driven only 22,600 miles and had only one prior owner. If prior owners' low mileage claims were true, documentation would have been kept, especially by the individual that sold CCE the car, and passed on from owner to owner.

The *Diersen* decision conflicts with *Jones v. Fenton Ford, Inc.*, 427 F.Supp. 1328 (D. Conn. 1977) because in that case, the court found that intent to defraud existed despite the fact that "actual knowledge" of the violation was not shown. The court stated that civil liability could be imposed when a defendant's statements are recklessly or carelessly made, either without knowledge of their truth or falsity, or without reasonable grounds for belief in their truth. In *Diersen*, while many material facts showed that CCE certified the car's mileage without reasonable grounds to believe the mileage claim, the Seventh Circuit imposed a higher requirement, namely that Diersen had to present sufficient evidence to prove that CCE "knew or suspected" that an odometer discrepancy existed.

Finally, the *Diersen* decision conflicts with *Ragland* because in that case, the court found that the dealer's being able to obtain a car for a low price should make the dealer suspicious of the car's low claimed mileage. In *Diersen*, the CCE obtained the car for approximately half its wholesale value.

Conflict With The Intent of the Act Any decision that discourages buyers from relying on dealers' odometer disclosure statements conflicts with the intent of the Act. Because the decision in *Diersen* denies a buyer his right to a jury trial to resolve a dispute involving a dealer's odometer disclosure statement, it clearly discourages

other buyers from relying on such statements, and therefore, the decision conflicts with the intent of the Act. Without the right to a jury trial, many federal statutes, including the Federal Odometer Act, are virtually impotent for civil action purposes, especially for civil actions by consumers against businesses. Because a very large percentage of cases involving such statutes are routinely resolved by summary judgment in favor of businesses, consumers who have suffered damages, including odometer fraud victims, often do not seek remedy at law, but instead, they simply pretend that they are unaware of any mileage discrepancy and simply "pass the fraud along." In addition, knowing that they are virtually "immune from suit," businesses, including car dealers, are more prone to engage in fraudulent practices, including odometer fraud. Odometer fraud victims not being allowed to present their cases to juries is a major reason why odometer fraud is a costly problem that is growing significantly.

Hinderance Of Enforcement Of The Act According to NHTSA, odometer fraud is increasing dramatically. According to some estimates, it is currently costing consumers as much as $10 billion each year. The Department of Justice cites inadequate state processing of titles as a major contributing cause and estimates that on average, odometer fraud costs the typical victim about $4,000. While NHTSA has asked Congress for more funds to fight odometer fraud, it currently has only four investigators with a $700,000 budget working on the problem, the same number of investigators it had in 1984. To conserve its budget, NHTSA prosecutes only the biggest of the big cases – at least 200 cars have to be involved and that might result in only a two-year sentence. Concerning NHTSA's growing backlog of leads, the Chief of NHTSA's odometer fraud staff, Richard Morse, has been quoted in the media as saying, "It's really frustrating for me, as manager for nationwide enforcement, because we can't do anything more about it."

If sufficient evidence for a jury to decide if a dealer should have been suspicious of a car's claimed mileage does not exist in *Diersen*, then no amount of evidence would make any dealer suspicious of any mileage claim and the Federal Odometer Act has been rendered impotent. The *Diersen* decision severely hinders the ability of odometer fraud victims to bring civil actions against dealers. It also severely hinders the ability of NHTSA and other governmental entities to bring criminal actions against dealers. Given its limited resources, to enforce the Act, NHTSA is almost totally dependant on individuals bringing civil actions against dealers and other governmental entities bringing criminal actions against dealers. Therefore, anything that hinders the ability of individuals or governmental entities to bring such actions hinders enforcement of the Act.

Harm To Odometer Fraud Victims' Rights The *Diersen* decision severely hinders the ability of odometer fraud victims to bring civil actions against dealers because the decision effectively grants dealers immunity from jury trials unless the dealer virtually admits that it intended to defraud. Therefore, the decision severely harms odometer fraud victims' rights.

II. THE SEVENTH CIRCUIT MISAPPLIED THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE FEDERAL RULES OF CIVIL PROCEDURE CONCERNING THE RIGHT TO A JURY TRIAL

Many decisions have clarified how the Seventh Amendment to the United States Constitution and Rules 12(c), 38(a), and 56(c) of the Federal Rules of Civil Procedure should be applied concerning the right to a jury trial. The following decisions show that the Seventh Circuit misapplied the amendment and the rules in *Diersen*. According to the court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L.Ed. 2d 202, 106 S. Ct. 2505 (1986), a

genuine issue for trial is one which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. However, in *Diersen*, the Seventh Circuit's conclusion that a jury could not return a verdict for Diersen is based on an assumption that the jury would reject evidence that is stronger, for example, unusually low claimed mileage in relation to age, than weaker evidence that juries accepted in other cases. In addition, the Seventh Circuit failed to acknowledge or address in its opinion the bulk of Diersen's evidence that showed that CCE should have been suspicious of the mileage claim.

According to the court in *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 122 L.Ed. 2d 659, 133 S. Ct. 1262 (1993), when deciding a motion for summary judgment, a court must draw all reasonable inferences in light most favorable to the nonmovant. Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. In addition, according to the court in *Odom v. Roberts*, 606 So. 2d 114, 118 (Miss. 1992), a court's standard of review is limited when determining the sufficiency of the evidence on a motion for a directed verdict and when contradictory testimony exists, the court should "defer to the jury, which determines the weight and worth of testimony and credibility of the witness at trial."

However, in *Diersen*, the Seventh Circuit decided in CCE's favor even though no documentation, such as maintenance or repair receipts, existed to support the 22,600 mileage claim and the Seventh Circuit based its decision in large part on its credibility determination that a jury might believe CCE and the prior owners' "clerical error" explanation for the 75,000 mileage shown on prior titles rather than the testimony that Diersen's expert witness could give that the car had been driven "greatly in

excess of 22,600 miles." If the car's actual mileage was under 22,600, one of the car's prior owners would have had the purported clerical error corrected in a timely and proper manner. "Corrected" titles should have been issued to replace the car's purportedly erroneous second and third titles. The Seventh Circuit ignored the fact that the car's second owner of record stated under oath that in 1983 the car was in "poor condition," its body was "tattered pretty good," and there were other rust spots in addition to the rear quarter panels, which were completely rusted out. Other than its own and the prior owners' self-serving, unsupported, and disputed testimony, the only evidence that CCE submitted to show that CCE was not and should not have been suspicious of the mileage claim was that the individual who sold the car to CCE certified its mileage.

According to the courts in *Johnson v. Runyon, et al.*, 47 F.3d 911 (7th Cir. 1995) and *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994), all reasonable inferences from the record are to be drawn in favor of the non-moving party. According to the court in *Trap Rock Industries, Inc. v. Local 825*, 982 F.2d 884 (3rd Cir. 1992), a party opposing summary judgment must do more than rest upon allegations, general denials, or vague statements. However, in *Diersen*, the Seventh Circuit based its decision on crucial findings that were based solely on CCE's and the prior owners' unsupported, self-serving, and disputed claims that the Seventh Circuit erroneously stated as being fact.

According to the court in *Landrum v. Goddard*, 921 F.2d 61 (5th Cir. 1991), contrary to other types of fraud claims, plaintiff's burden of proof under the Federal Odometer Act is a preponderance of evidence. However, in *Diersen*, while Diersen submitted two titles and three title applications that showed the car had been driven at least 75,000 miles and a preponderance of evidence that CCE should have been suspicious of the 22,600 mileage

claim and neither CCE nor the prior owners submitted any documentation, such as maintenance or repair receipts, to support their 22,600 mileage claim, the Seventh Circuit found in CCE's favor.

While the Federal Odometer Act does not provide for a jury trial in all cases, the test, according to *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974), is "whether the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than an action in equity or admiralty." Because an action under the Act is based upon fraudulent conduct and seeks a remedy at law, there is clearly a right to jury trial unless the plaintiff's suit is frivolous. The important recurring question of whether plaintiffs in non-frivolous civil actions involving federal statutes such as the Federal Odometer Act should have the right to a jury trial according to the Seventh Amendment and the Federal Rules of Civil Procedure has not been directly addressed by any case and is not likely to be resolved by future cases, and therefore, it should be settled by the Supreme Court of the United States.

III. THE SEVENTH CIRCUIT'S AFFIRMATION OF SUMMARY JUDGMENT ON OTHER GROUNDS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The Seventh Circuit's affirmation of summary judgment on other grounds departed from the accepted and usual course of judicial proceedings because discovery had not been completed and Diersen had not had an adequate opportunity to introduce evidence or fully brief his arguments; the District Court Magistrate Judge had subsequently made statements and reached conclusions favoring Diersen; the Seventh Circuit based its affirmation on credibility determinations that had not been addressed by a jury or by the District Court Judge; and the Seventh Circuit decision failed to acknowledge or

address the bulk of the material facts that favored Diersen's argument.

The District Court granted CCE summary judgment even though Diersen's discovery had not been completed and Diersen had not had an adequate opportunity to argue his case. The record clearly shows that Edelman had failed to depose the car's original owner, the individual who had possession of the car for a substantial period of time between the car's first and second owner of record, and the CCE salesman that Diersen dealt with. In addition, Edelman had failed to depose as adverse parties CCE's president as well as the car's second, third, and fourth owners of record. The record shows that on September 30, 1995, October 9, 1995, and October 16, 1995, Diersen requested Edelman to seek an extension of time to complete discovery as well as postpone the jury trial, but Edelman failed to do so. Because the District Court relied on the old car exemption to grant CCE summary judgment, in his subsequent pleadings, Diersen did not focus on evidencing that CCE's mileage statement was inaccurate or that CCE had intended to defraud Diersen. Because discovery was not complete, the Seventh Circuit made many erroneous initial factual findings concerning the intent to defraud issue and took many unsupported, self-serving, and disputed claims made by CCE and the prior owners and stated them as though they were facts.

On April 18, 1996, the District Court Magistrate Judge in the case stated in open court that "you probably have a wonderful state claim of fraud" and that "you may have a very, very fine state claim on misrepresentation, fraud, and consumer fraud." In his September 25, 1996 Report and Recommendation, the Magistrate Judge concluded that the car "had been driven some 75,000 miles." Congress passed the Federal Odometer Act in part because of the major difficulties consumers face in proving odometer fraud in state courts. If the Magistrate Judge believes that Diersen has a strong state claim of

fraud, certainly Diersen has an even stronger federal claim of fraud under the Act.

Diersen's expert witness, Mike Grippo, is a Professional Automobile Appraiser who has testified in odometer fraud cases. By stating "if a jury believed Grippo, it could **perhaps** find that the odometer statement provided by the CCE was erroneous," the Seventh Circuit accorded great credibility to the self-serving, unsupported, and disputed opinions voiced by three of the car's prior owners. But not all the car's prior owners were deposed and those that were deposed, were not deposed as adverse parties. They provided no documentation to support their opinions and they have every reason to lie about the car's mileage. The facts clearly show that they failed to comply with the mileage disclosure requirements of the Act as well as the Illinois Odometer Act and that they benefitted from "passing the fraud along." Obviously, CCE also has every reason to lie that it was not suspicious of the car's claimed mileage.

The Seventh Circuit erred when it accorded more credibility to the car's prior owners and to CCE than to Mr. Grippo. The statements made by the car's prior owners and CCE are nothing more than self-serving, unsupported, and disputed opinions. On the other hand, Mr. Grippo has indicated that he will testify to a jury that in his expert opinion, the car was driven at least 75,000 miles, that sufficient facts existed to make CCE suspicious of the 22,600 mileage claim, and that if CCE had done a minimal mileage investigation, it would have learned of the odometer discrepancy. It is well established that it is the jury's responsibility and not the court's to assess the credibility of witnesses. Clearly, if the Seventh Circuit had accorded proper weight to the above facts and to Mr. Grippo's testimony, it would have found that a rational jury could have agreed with the Magistrate Judge and Mr. Grippo and concluded that the car had been driven at

least 75,000 miles and that Diersen had introduced sufficient evidence of odometer fraud.

In his April 14, 1997 Petition for Rehearing, as discussed above, Diersen cited many additional important material facts in the record that the Seventh Circuit had not acknowledged or addressed in its opinion that evidenced that CCE should have been suspicious. Diersen argued in his petition that taken as a whole, those facts would have made CCE and any other dealer suspicious and would have prompted them to investigate the car's title history.

Clearly, the Seventh Circuit should not have decided issues involving odometer statement accuracy or the intent to defraud because the District Court did not grant summary judgment on those grounds, its Magistrate Judge subsequently made statements and reached conclusions favoring Diersen even though Diersen's discovery was not complete and Diersen had not had an adequate opportunity to introduce evidence or fully brief his arguments. Clearly, based on the material facts in the record as discussed above, the Seventh Circuit should have reversed its March 31, 1996 decision concerning the sufficiency of evidence of odometer fraud and remanded the case to the District Court for jury trial.

IV. THE SEVENTH CIRCUIT MADE ERRONEOUS FACTUAL FINDINGS AND CREDIBILITY DETERMINATIONS TO DEVELOP THE RECORD CONCERNING THE INTENT TO DEFRAUD ISSUE

Because discovery was not complete and Diersen had not had an adequate opportunity to argue his case, the Seventh Circuit made many erroneous initial factual findings and credibility determinations to develop the record concerning the intent to defraud issue. The Seventh Circuit took many unsupported, self-serving, and disputed claims made by CCE and stated them as though they

were facts. For example, the Seventh Circuit found that CCE had "concluded that the car was in good condition and did not suspect that the odometer reading was inaccurate" and "CCE's own inspection of the vehicle did not suggest that the 22,600 mile figure was inaccurate or erroneous." In reality, these are unsupported, self-serving, and disputed claims made by CCE that the Seventh Circuit erroneously stated as being fact.

The Seventh Circuit found that Diersen's subsequent investigation of the car's title history was "extensive." In reality, that is an unsupported, self-serving, and disputed claim made by CCE that the Seventh Circuit erroneously stated as being fact. Diersen did not do an "extensive" investigation of the car's title history. He merely did what CCE could and should have done. He merely obtained copies of the car's titles and title applications by completing a simple form and sending it with $4 to the Illinois Secretary of State. Because those documents showed that the car had been driven at least 75,000 miles, he contacted the car's prior owners by phone. Another minimal effort that CCE could have and should have made that would not have required obtaining title documents was to talk to the individual who sold the car to the individual that CCE bought it from. That alone would have disclosed the odometer discrepancy and that the car had more prior owners than claimed.

The Seventh Circuit found that CCE made a valid refund offer, Diersen "refused" that offer, and Diersen's "allegation of fraudulent or evil intent is belied by the fact that the CCE, in good faith, offered to allow Diersen to return the car for full refund of his money (an offer which Diersen rejected, preferring to pursue this lawsuit)." In reality, these are unsupported, self-serving, and disputed claims made by CCE that the Seventh Circuit erroneously stated as being fact. While CCE indicated that it might take return of the car and refund Diersen what he had paid CCE, CCE refused to put anything in

writing and it refused to discuss the $2,600 that Diersen had invested in the car. CCE's purported refund offer was oral, vague, and it was not made directly to Diersen. Diersen did not refuse or reject CCE's purported offer; Diersen merely asked CCE to put it in writing, but CCE never did. If CCE had made a valid and reasonable settlement offer, Diersen would have accepted it. CCE never responded to a written settlement offer that Diersen provided CCE on April 30, 1996. Diersen did not prefer to file a lawsuit against CCE and would not have done so if Edelman did not believe that CCE intended to defraud Diersen. While Edelman withdrew, he has never indicated that he does not continue to believe that CCE intended to defraud Diersen.

The Seventh Circuit found that a jury might believe the prior owners' "clerical error" explanation for the 75,000 mileage show on prior titles rather than the testimony that Diersen's expert witness could give that the car had been driven "greatly in excess of 22,600 miles." In reality, to reach that finding, the Seventh Circuit made a credibility determination that it clearly should not have made.

The Seventh Circuit found that CCE was not more than merely negligent when it (a) ignored the car's unusually low claimed mileage in relation to its age, the "worn condition of the drivers seat," and the "damaged condition of the vehicle's oil pan;" (b) did not conduct "further inquiry into the car's mileage;" and (c) relied on the 22,600 mileage claim made by the individual it purchased the car from. The first argument that CCE and the Seventh Circuit rely on is CCE's claim that it "concluded that the car was in good condition and did not suspect that the odometer reading was inaccurate" and "CCE's own inspection of the vehicle did not suggest that the 22,600 mile figure was inaccurate or erroneous." The second argument that CCE the Seventh Circuit rely on is CCE's claim that only an "extensive" investigation would

have disclosed the mileage discrepancy. The third argument that CCE and the Seventh Circuit rely on is CCE's claim that it was justified in relying on the 22,600 mileage claim made by the individual it purchased the car from. Clearly, the Seventh Circuit's findings are based solely on CCE's unsupported, self-serving, and disputed claims cited above that the Seventh Circuit erroneously stated as being fact. In addition, they are clearly erroneous findings because they assert erroneous criteria. It is clear from cases decided under the Act that dealers cannot (a) ignore material facts such as unusually low claimed mileage in relation to vehicle age or the "worn condition of the drivers seat;" (b) escape responsibility by claiming that only an "extensive" mileage investigation would have disclosed the mileage discrepancy; or (c) rely on mileage claims made by individuals they purchase cars from unless no material facts existed that would have made it or other dealers suspicious of the mileage claim.

The Seventh Circuit found that "there is, in short, no evidence to suggest that CCE knew or suspected that the 22,600 mile figure was mistaken, much less that it intended to defraud Diersen by providing an inaccurate odometer reading" and "Diersen has not introduced any evidence showing that the CCE acted with intent to defraud" and there was "insufficient evidence upon which to base a finding of odometer fraud." Clearly, these crucial findings sound CCE's arguments and are based solely on CCE's unsupported, self-serving, and disputed claims cited above that the Seventh Circuit erroneously stated as being fact. In addition, they are clearly erroneous findings because they assert erroneous criteria. It is clear from cases decided under the Act that odometer fraud victims do not have to prove that the dealer "knew or suspected" that an odometer discrepancy existed. All they have to prove is that the dealer should have known of the discrepancy or should have suspected it. The record in this case shows more than sufficient evidence

exits that CCE should have known of the discrepancy or should have suspected it.

V. BECAUSE THE ACT DOES NOT INCLUDE ANY EXEMPTIONS AND THE ACT HAS NOT BEEN AMENDED TO GIVE DOT AUTHORITY TO GRANT ANY EXEMPTIONS, IT WAS IMPROPER FOR DOT TO REJECT THE SEVENTH CIRCUIT'S FINDING THAT THE OLD CAR EXEMPTION IS INVALID

The Act does not exempt any class of motor vehicle nor has it been amended to give DOT authority to grant exemptions for any class of motor vehicle. In 1988, DOT, acting through NHTSA, issued regulations that exempted certain classes of motor vehicles from the Act's mileage disclosure requirements. Regulation 49 CFR 580.6(a)(1) exempted trucks over 16,000 pounds. Regulation 49 CFR 580.6(a)(3) exempted cars over 10 years old. Regulation 49 CFR 580.6(b) exempted new cars prior to their first retail sale. In 1994, in *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433, the Ninth Circuit invalidated the heavy truck exemption because Act does not include any exemptions and the Act has not been amended to give DOT authority to grant any exemptions. In *Diersen*, the Seventh Circuit invalidated the old car exemption for the same reason. In addition, in *Diersen*, the Seventh Circuit strongly indicated that all NHTSA's exemptions, including the new car exemption, were invalid.

On May 28, 1997, relying on Section 332 in its 1997 appropriations act, Public Law 104-205 (Sept. 30, 1996), NHTSA sent a letter to the American Association of Motor Vehicle Administrators and posted it on its World Wide Web internet site. In that letter, NHTSA announced that it was rejecting the Seventh Circuit's invalidation of the old car exemption and that NHTSA was going to "publish a final rule repromulgating all of the exemptions

currently contained in 49 CFR 580.6," that it was going to "make this final rule effective immediately upon publication in the *Federal Register*, and that it was going to "post the *Federal Register* notice and other relevant information on its World Wide Web site." According to Section 332, "Notwithstanding any other provisions of law, the Secretary may use funds appropriated under this Act, or any other subsequent Act, to administer and implement the exemption provisions of 49 CFR 580.6 and to adopt or amend exemptions from the disclosure requirements of any class or category of vehicles that the Secretary deems appropriate."

Clearly, it was improper for NHTSA to reject the Seventh Circuit's invalidation of the old car exemption because the Seventh Circuit did not find Section 332 to be relevant, let alone controlling, or it would have addressed it in its opinion. The fact remains that according to the Act, no class of motor vehicle, including old or new cars or trucks are exempt from the Act's mileage disclosure requirements unless Congress amends the Act to specifically exempt them or to specifically give DOT the authority to exempt them. According to the National Consumer Law Center, Inc.'s (NCLC) May/June 1997 *NCLC REPORTS*, "NHTSA is attempting to limit the impact of *Diersen* by taking the (questionable) position that the language in a 1996 appropriation bill provides NHTSA with statutory authority to exempt cars over 10 years old."

Because NHTSA rejects the Seventh and Ninth Circuit decisions in *Diersen* and *Orca*, dishonest dealers can rely on *Smith v. Walt Bennett Ford, Inc.* and issue fraudulent odometer disclosure statements for old cars and heavy trucks and escape the Act's penalties by claiming that they were not aware that they were not required to issue mileage disclosure statements, and therefore, they

had not voluntarily relinquished their right to not issue such statements.

Concerning new cars and trucks, because NHTSA rejects the Seventh and Ninth Circuit decisions, the abuses brought to light in *Maugh v. Chrysler Corporation*, 818 S.W.2d 658 (Mo.App. 1991) and *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346 (Mo.Ct.App. 1993) are more likely to continue. In connection with the *Maugh* case, Lee Iaccocca is reported in the national press to have admitted that Chrysler had disconnected odometers on new vehicles, driven them, in some instances wrecked and repaired them, and sold them to their dealers as "new" with the odometers reconnected. Chrysler is reported to have admitted doing this with over 60,000 cars over a three year period and sought to defend itself on the basis that this was a standard industry practice. According to the court in *Maugh*, "Chrysler complained it was precluded from offering evidence about the OEP program being part of an industry wide custom and practice. Chrysler also argued industry custom as relevant to fraud." If car and truck manufacturers were required to issue odometer disclosure statements for new cars and trucks prior to first retail sale, odometer fraud of the type described in *Maugh* and *Carpenter* would be significantly hindered. Dealers and consumers would have a stronger basis to bring civil actions against car and truck manufacturers under Section 32710 and governmental entities would have a stronger basis to bring criminal actions.

CONCLUSION

The issues involved in this case, especially the right to a jury trial and the obligation of executive branch agencies not to exceed the authority given them by the legislative branch and to follow decisions rendered by the judicial branch, are very important issues that this Court

should address. The above clearly shows that the Seventh Circuit decision concerning the intent to defraud issue creates an intolerable conflict with other decisions, it directly conflicts with the intent of the Act, it severely hinders enforcement of the Act, and it severely harms odometer fraud victims' rights under the Act. The above also clearly shows that the Seventh Circuit misapplied the Seventh Amendment to the United States Constitution and the Federal Rules of Civil Procedure concerning the right to a jury trial.

Clearly, the Seventh Circuit's affirmation of summary judgment on other grounds departed from the accepted and usual course of judicial proceedings because discovery had not been completed and Diersen had not had an adequate opportunity to introduce evidence or fully brief his arguments; the District Court Magistrate Judge had subsequently made statements and reached conclusions favoring Diersen; the Seventh Circuit based its affirmation on credibility determinations that had not been addressed by a jury or by the District Court Judge; and the Seventh Circuit decision failed to acknowledge or address the bulk of the material facts that favored Diersen's argument. Clearly, the Seventh Circuit made erroneous factual findings and credibility determinations to develop the record concerning the intent to defraud issue.

Finally, because the Act does not include any exemptions and the Act has not been amended to give DOT authority to grant any exemptions, it was improper for DOT to reject the Seventh Circuit's finding that the old car exemption is invalid. For the above reasons, Diersen

respectfully requests that this Court grant a Writ of Certiorari.

Respectfully submitted,

DAVID J. DIERSEN
Petitioner, *Pro Se*

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 96-1588

DAVID J. DIERSEN,

Plaintiff-Appellant,

v.

CHICAGO CAR EXCHANGE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 2543—**Suzanne B. Conlon**, *Judge.*

ARGUED SEPTEMBER 16, 1996—DECIDED MARCH 31, 1997

Before POSNER, *Chief Judge*, COFFEY and KANNE, *Circuit Judges.*

COFFEY, *Circuit Judge.* David Diersen filed a complaint against the Chicago Car Exchange ("CCE"), an automobile dealership, alleging that the CCE fraudulently furnished him an inaccurate odometer reading when it sold him a 1968 Dodge Charger, in violation of the Vehicle Information and Cost Savings Act ("the Odometer Act" or "the Act"). 49 U.S.C. § 32701 *et seq.* (formerly 15 U.S.C. § 1981 *et seq.*). The Odometer Act requires all persons transferring a motor vehicle to give an accurate, written odometer reading to the purchaser or recipient of the transferred vehicle. Under the Act,

those who disclose an inaccurate odometer reading with the intent to defraud are subject to a private cause of action by the transferee and may be held liable for treble damages or $1500, whichever is greater. 49 U.S.C. § 32710. The district court granted the defendant's motion for summary judgment, relying upon a regulation promulgated by the National Highway Traffic Safety Administration ("NHTSA") which purports to exempt vehicles that are at least ten years old (such as the one Diersen purchased from the CCE) from the Act's odometer disclosure requirements. 49 C.F.R. § 580.6(a)(3). Because we hold that the NHTSA exceeded the scope of its statutory authority when it created this exemption for older cars, we reverse that portion of the district court opinion which relies upon the NHTSA regulation as a ground for ruling in favor of the CCE. We affirm the grant of summary judgment on other grounds.

I. BACKGROUND

1. Diersen's Purchase of the 1968 "Charger R/T" From the CCE

On July 23, 1994, Diersen purchased a 1968 Dodge "Charger R/T" from the CCE for $16,790. The CCE provided Diersen with a written odometer disclosure statement, as required under the Act, stating that the actual mileage of the vehicle was 22,633. A caption at the top of the disclosure document stated:

> Federal (and State law, if applicable) requires that you state the mileage upon transfer of ownership. Failure to complete or provide a false statement may result in fines and/or imprisonment.

The CCE also provided Diersen with an appraisal document stating that the car had 22,600 original miles, as well as a fact sheet stating that the car had 22,600 miles and just one prior owner.

The CCE had purchased the vehicle in question from an individual named Joseph Slaski, who certified to the CCE that the mileage on the car was approximately 22,600 miles and stated that the vehicle had but one prior owner. After acquiring the vehicle but before selling it to Diersen, the CCE inspected the car visually, test-drove the car, and looked at the car's engine. The CCE concluded that the car was in good condition and did not suspect that the odometer reading was inaccurate.

Diersen, after purchasing the Charger, conducted an extensive investigation into the car's title history and discovered that the vehicle had previously been described in title documents as having mileage of 75,000. As part of his investigation, Diersen telephoned two of the car's prior owners, Dennis Sobieski and Robert Dreschbourg (the original owner of the car). Both individuals informed him that the high mileage noted on the title documents was a discrepancy, arising from a clerical error, and asserted that the vehicle was in fact a low-mileage car. Sobieski later gave deposition testimony reiterating what he initially told the plaintiff: that the 75,000 mile figure was inaccurate and the result of a clerical error.

Before Diersen filed this lawsuit, the CCE offered to have Diersen return the car for a complete refund. Diersen refused this offer and decided instead to sue the CCE for fraud under the Act.

2. Procedural History

In response to Diersen's claim of odometer fraud, the CCE brought a motion for summary judgment, which the district court granted on the basis of a regulation, promulgated by the NHTSA, which purported to exempt cars ten years old or older (such as the 1968 Dodge Charger) from the disclosure requirements of the Act. Following the entry of summary judgment on December

27, 1995, Diersen filed a motion to amend his complaint, pursuant to Fed.R.Civ.P. 15(a). He sought leave to amend his complaint so that he could include additional defendants, incorporate new factual material, and advance a new argument that the NHTSA regulation exempting older vehicles was invalid as a matter of law. Diersen's motion to amend was denied January 12, 1996, without a written opinion. Diersen then filed a motion for reconsideration of the court's summary judgment order, arguing that (1) the older-car exemption created by the NHTSA lacked any basis in the Act and was therefore invalid, or *alternatively*, (2) newly discovered facts demonstrated that the CCE knew of the exemption for older cars but waived that exemption, thus admitting that it was bound by the odometer disclosure requirements of the Act. The court denied Diersen's motion to reconsider on February 15, 1996, after both parties had submitted memoranda on the issues raised by Diersen.

II. ISSUES

The initial and most important question presented in this appeal is whether the district court properly granted summary judgment in favor of the CCE with respect to Diersen's claim of odometer fraud. Diersen argues that the NHTSA lacked statutory authority to exempt older vehicles (such as the one he purchased) from the disclosure requirements of the Act. Thus, according to Diersen, it was erroneous for the district judge to rely upon the NHTSA's regulatory exemption as a basis for granting summary judgment in favor of the defendant. The CCE contends that the NHTSA regulation is a valid exercise of the NHTSA's regulatory authority, and further argues that even if the regulation is deemed *invalid* (i.e., even if the Act applies to the sale of older vehicles) the CCE is entitled to summary judgment because Diersen has

failed to come forward with sufficient evidence that the CCE committed odometer fraud.

In addition to challenging the district court's summary judgment order, Diersen assigns as error the denial of both his motion to amend and his motion to reconsider.

III. DISCUSSION

1. The Odometer Act and Accompanying Federal Regulations

The Act provides, in relevant part:

> **(a) Written disclosure requirements.—(1)** Under regulations prescribed by the Secretary of Transportation, a person transferring ownership of a motor vehicle shall give the transferee a written disclosure—
>
> > **(A)** of the cumulative mileage registered by the odometer; or
> >
> > **(B)** that the mileage is unknown if the transferor knows that the mileage registered by the odometer is incorrect.
>
> **(2)** A person making a written disclosure required by a regulation prescribed under paragraph (1) of this subsection may not make a false statement in the disclosure.
>
> * * *
>
> **(4)** The regulations prescribed by the Secretary shall provide the way in which information is disclosed and retained under this section.

49 U.S.C. § 32705. "Motor vehicle" is defined in the Odometer Act as a "vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line." 49 U.S.C.

§ 32101(7). The Odometer Act provides for a private cause of action against a person who violates the Act with the "intent to defraud," the violator being liable for three times the actual damages or $1500, whichever is greater. 49 U.S.C. § 32710.

In 1988, the Secretary of Transportation ("Secretary") promulgated, through the NHTSA, a regulation which purported to exempt vehicles "ten years old or older" from the disclosure requirements of the Act. 49 C.F.R. § 580.6(a)(3).[1]

2. The NHTSA's Authority to Exempt Older Vehicles from the Disclosure Requirements of the Odometer Act

Diersen argues that the NHTSA lacked any statutory authority to promulgate the regulation quoted above, exempting vehicles ten years or older from the Act's odometer disclosure requirements. Diersen did not raise this argument concerning the validity of the NHTSA regulation until after summary judgment had been entered by the district court, at which time he filed a motion to amend his complaint and a motion to reconsider.[2] The general rule in civil cases is that we may not address, for the first time on appeal, an argument which has not been raised at the trial court level. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Amcast Indus. Corp. v. Dextrex Corp.*, 2 F.3d 746, 749 (7th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994). As the United States

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[1] The NHTSA also exempted heavy trucks from the odometer disclosure requirements of the Act. Code of Federal Regulations section 580.6(1) exempts vehicles with a "Gross Vehicle Weight Rating, as defined in § 571.3 of this title, of more than 16,000 pounds."

[2] These motions are discussed in more detail *infra*.

Supreme Court has explained, this rule is "essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). "[W]e should [also] not consider a litigant's issue if that litigant did not give a trial court the first opportunity to decide the issue." *United States v. Payne*, 102 F.3d 289, 293 (7th Cir. 1996). Nevertheless, as the Supreme Court has also emphasized, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the *discretion* of the courts of appeal, to be exercised on the facts of individual cases." *Singleton*, 428 U.S. at 121 (quoted in *Sprosty v. Buchler*, 79 F.3d 635, 645 (7th Cir. 1996)).

We note, first, that Diersen *did* challenge the validity of the exemption for vehicles at least ten years old before the trial court, though belatedly, in his motion to reconsider. The district judge chose not to address this issue, but the parties did brief the question for the benefit of the court, and both Diersen and the CCE have fully briefed and argued the matter before this panel. Thus, there is no danger that any of the litigants will be "surprised on appeal" if we address and resolve this issue. *Hormel*, 312 U.S. at 556. We also note that the validity of the NHTSA regulation is a question of law, as to which our review is plenary. In addressing this issue, we need not engage in any improper fact-finding to further develop the record, for the only relevant fact is the age of the car sold to Diersen, and the parties agree that the vehicle in question is more than ten years old. As in the case of *Amcast Indus. Corp. v. Dextrex Corp.*, we are confronted with a purely legal issue which has been fully briefed and argued by the parties. 2 F.3d at 750. Thus, "there is no reason to defer its resolution to another case. There will be no better time to resolve the issue than now." *Id.*

We begin our analysis of the NHTSA regulation by observing that the text of the Act does not, either explicitly or implicitly, exempt any class of motor vehicles from its odometer disclosure requirements. Nor does the statutory definition of "motor vehicle" provide a basis for the exemption promulgated by the NHTSA. Moreover, Congress has actually circumscribed the extent to which the Secretary may interpret the Act by limiting the NHTSA's regulatory authority to the promulgation of mere procedural or logistical rules. *See* 49 U.S.C. § 32705(a)(4) ("The regulations prescribed by the Secretary shall provide the *way* in which [the odometer] information is disclosed and retained.") (emphasis added). The CCE argues, without reference to any specific language in the Act, that Congress *expressly* delegated to the Secretary the authority to create the older car exemption. We disagree. Congress directed the Secretary to promulgate rules providing for *procedural* adherence to the Act, but it did not authorize—either explicitly or implicitly—the creation of exemptions to the law.

The CCE argues that in considering the validity of the NHTSA regulation, we must defer to the NHTSA's interpretation of the Act, because the NHTSA is the agency charged with administering the Act and thus has familiarity and expertise that we do not possess. We do defer to an administrative agency's reasonable *construction* of a statute *if* (as is not the case here) the statute is silent or ambiguous.[3] On the other hand, "[i]f the intent

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[3] If a "statute is silent or ambiguous with respect to the specific issue [arising out of the administrative rule], the question for the court is whether the agency's answer is based upon a permissible construction of the statute. . . . [That is,] whether the Administrator's view that [the rule] is appropriate in the context of this particular program is a reasonable one." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984).

of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Because the text of the Odometer Act does not even suggest—much less explicitly state—a legislative intent to exempt entire classes of vehicles from the disclosure requirements of the Act, we hold that the regulation is invalid and that the district court erred in relying upon this exemption when it granted summary judgment to the CCE.

Our holding is in accord with a number of decisions by other courts on a closely analogous issue: whether the NHTSA exceeded its statutory authority in promulgating an exemption to the odometer disclosure requirements of the Odometer Act for so-called "heavy trucks" (i.e., trucks with a gross weight in excess of 16,000 pounds). 49 C.F.R. § 560(1). A number of courts, including the Court of Appeals for the Ninth Circuit, have held that the NHTSA's "heavy truck" exemption, like the older-car exemption, has no basis in the text of the Odometer Act and represents an invalid exercise of regulatory authority. *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433 (9th Cir. 1994), *W.W. Walwork, Inc. v. Duchscherer*, 501 N.W.2d 751 (N.D. 1993), *Davis v. Dils Motor Co.*, 566 F.Supp. 1360 (S.D. W.Va. 1983) and *Lair v. Lewis Serv. Ctr.*, 428 F.Supp. 778 (Dist. Neb. 1977). The principle behind these cases also applies to the exemption for older cars. That principle is that "legislative power rests in Congress and . . . the will of Congress as unambiguously expressed in a properly enacted statute cannot be amended or altered by regulation . . . . [A] regulation to the extent it is in direct variance with an unambiguous statutory provision is void." *Davis*, 566 F. Supp. at 1362 (quoting *U.S. v. Maxwell*, 278 F.2d 206, 210 (8th Cir. 1960)).

Our holding that the older-car exemption is invalid also comports with the broad purposes of the Act, which are "to prohibit tampering with motor vehicle odometers; and to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers." 49 U.S.C. § 32701(b)(1)(2). There is nothing in this statement of purpose to suggest that the purchasers of older vehicles are less deserving of protection than consumers who buy newer vehicles. The statutory statement of purpose, read concomitantly with the language of the Act (which, to reiterate, does not specify any exemptions) establishes that Congress intended to protect *all* purchasers of motor vehicles from odometer tampering.

Finally, we observe that the Act provides for the levying of civil and criminal fines against violators at the discretion of the NHTSA. 49 U.S.C. § 32709. In the exercise of prosecutorial discretion, the NHTSA may opt to conserve its resources by declining to prosecute certain classes of vehicles (e.g., those cases involving older vehicles). However, the NHTSA does *not*, without statutory authority, have jurisdiction to tell victims of odometer fraud that they are without a remedy if the car they purchased was ten or more years old. This effectively removes a cause of action that Congress has unambiguously provided to *all* victims of odometer fraud, regardless of the age of the vehicle being purchased. As one member of this panel observed at oral argument, the regulation issued by the NHTSA, in effect, repeals a portion of the statute. There may be good policy reasons for exempting older vehicles from the requirements of the Act,[4] but that determination is legislative in nature

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[4] On the other hand, one might argue that the odometer disclosure requirements of the Act are all the more crucial for buyers of older cars, who would like to know whether they are purchasing an old car with low mileage or one which, consistent with its age, has been driven extensively.

and is properly made by Congress, and not by regulatory fiat. *See Orca Bay*, 32 F.3d at 436 ("[R]ationality is not enough. The Secretary need[s] Authority.").

To summarize, we hold that the NHTSA regulation is invalid. This means that the odometer disclosure requirements of the Act apply *regardless of the age of the vehicle*, and thus the defendant may be held liable under the Act *if*, when it sold the 1968 Charger to Diersen, it provided an inaccurate odometer disclosure statement with the intent to defraud Diersen.

3. Whether Diersen Has Introduced Sufficient Evidence of Odometer Fraud to Survive Summary Judgment

Although we agree with Diersen that the NHTSA regulation is invalid, this does not end our inquiry, for the CCE argues that it is entitled to summary judgment even if the odometer disclosure requirements of the Act *do* apply to the sale of the 1968 Dodge Charger. In order to succeed on his claim of odometer fraud, Diersen must demonstrate two essential elements: (1) a violation of the Act's odometer disclosure requirements (i.e., the providing of an inaccurate odometer reading), and (2) an intent to defraud. *Jones v. Hanley Dawson Cadillac*, 848 F.2d 803, 805-6 (7th Cir. 1988). Our review of the summary judgment record persuades us that a rational trier of fact could *not* find in Diersen's favor as to the second element (intent to defraud); therefore, we affirm the entry of summary judgment in the defendant's favor.[5]

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[5] The district court assumed (incorrectly) that the regulatory exemption for older vehicles was valid. Therefore, it did not address the question of whether Diersen had come forward with sufficient evidence of an inaccurate odometer statement and/or fraudulent intent. Nevertheless, it is well-established

(continued...)

Diersen claims that the odometer statement provided by the CCE was inaccurate and that the vehicle in question had actually been driven 75,000 miles as opposed to just 22,600. Let us examine this claim. Three of the car's former owners, deposed by Diersen, testified that in their opinion the car was a "low-mileage" vehicle (not driven 75,000 miles as Diersen asserts), and that any indication to the contrary on the title was in error. Dennis Sobieski, one of the prior owners, explained that in his view the 75,000 mile figure which appeared on various title documents had resulted from a clerical error which arose during the time he owned the car:

> [The car] didn't have 75,000 miles. My brother knew the car since it was knew [sic], and the car, other than the body because it sat outside, was a new car. There was never any rattle in the damn thing. It was a nice car . . . to cut to the chase here a little bit, this car at that time did not have one third of 75,000 miles on the car. There was a goof-up on the title. Did you ever deal with the Secretary of State and try to get some of this stuff straightened out?

Notwithstanding the testimony of the car's former owners, Diersen steadfastly maintains that the mileage statement provided by the CCE was inaccurate, and he offers in support of this claim an affidavit by Mike Grippo, an automobile appraiser. Grippo avers that he inspected the car and that the "worn condition of the drivers seat" and the "damaged condition of the vehicle's oil pan" were consistent with a vehicle that had been

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[5] (...continued)
that "our task [in reviewing a decision to grant summary judgment] is to review de novo the record and the controlling law." *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 688 (7th Cir. 1992). Furthermore, "*an appellate court may affirm on any ground that finds support in the record.*" *Id.* n. 1 (emphasis added).

driven "greatly in excess of 22,600 miles." If a jury believed Grippo, it could *perhaps* find that the odometer statement provided by the CCE was erroneous.

However, even if a jury were to agree with the plaintiff that the odometer statement was inaccurate, that is only *one* of the elements necessary to prove odometer fraud under the Act. This court has observed that "the mere fact that an automobile dealer has violated the disclosure requirements of the Odometer Act [by providing an erroneous odometer reading] does not necessarily mean that he is civilly liable. The dealer must have acted with 'an *intent to defraud*' in order to be subject to liability . . . ." *Hanley Dawson Cadillac*, 848 F.2d at 806 (emphasis added). "[M]ere negligence cannot be the basis of civil liability under the Odometer Act." *Id.* Diersen speculates that the CCE "acted with an intent to defraud because it knew or should have known, that the mileage on the 1968 Dodge Charger was suspect." The record reflects that the CCE relied upon the sworn odometer statement provided by Joseph Slaski, the individual from whom the CCE purchased the vehicle. This certification, as well as the fact sheet completed by Slaski, put the mileage at approximately 22,600 miles (the fact sheet also indicated that the car had but one owner). The CCE's own inspection of the vehicle did not suggest that the 22,600 mile figure was inaccurate or erroneous. There is, in short, no evidence to suggest that the CCE knew or suspected that the 22,600 mile figure was mistaken, much less that it intended to defraud Diersen by providing an inaccurate odometer reading. One could perhaps argue that in light of the car's age, the CCE ought to have conducted further inquiry into the car's mileage instead of relying upon the figure given by Slaski. However, as this court pointed out in *Hanley Dawson Cadillac*, *supra*, "mere negligence" is by no means the same as "intent to defraud," and without any evidence of fraudulent intent, Diersen cannot prevail on his claim of odometer fraud.

Indeed, the plaintiff's allegation of fraudulent or evil intent is belied by the fact that the CCE, in good faith, offered to allow Diersen to return the car for a full refund of his money (an offer which Diersen rejected, preferring to pursue this lawsuit). Because Diersen has not introduced any evidence showing that the CCE acted with an intent to defraud, we hold that the CCE is entitled to summary judgment as a matter of law.

4. Procedural Issues Raised by Diersen

A. Denial of Diersen's Motion to Amend

Following the entry of summary judgment, Diersen sought to amend his complaint, pursuant to Fed.R.Civ.P. 15(a), so that he could: (1) add new defendants (two prior owners of the car as well as two CCE employees who sold him the car), (2) add a new count alleging that the NHTSA exemption for older cars was invalid, and (3) include facts to show that even if the regulatory exemption was valid, the defendants waived that exemption.[6] The district court denied Diersen's motion in a one-line minute order, without stating its reasons on the record. "We review such a denial by a district judge for an abuse of discretion." *Amendola*, 907 F.2d at 764. Indeed, this court has recognized that the district judge is "particularly well suited to judge the worthiness of a plaintiff's motion to amend his complaint, having been involved in the progress of the case throughout its development and

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[6] We note that Diersen did not follow the proper procedure in filing his motion to amend. "In this circuit, after a judgment has been entered, a party must have the judgment reopened pursuant to Federal Rule of Civil Procedure 59(e) or 60(b) and then request leave to amend pursuant to Rule 15(a)." *Amendola v. Bayer*, 907 F.2d 760, 765 n. 4 (7th Cir. 1990). Diersen did not attempt to have the judgment reopened prior to filing his motion to amend.

having viewed first-hand the party's diligence or lack thereof." *Id.*

Rule 15(a) embodies a "liberal" approach to pleading and states that "leave [to amend] shall be freely granted when justice so requires," but this court has recognized that "justice may require something less in post-judgment situations than in pre-judgment situations." *Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185, 1196 (7th Cir. 1985). Specifically, we have stated that "*delay in presenting a post-judgment amendment when the moving party had an opportunity to present the amendment earlier is a valid reason for a district court not to permit an amendment.*" *Id.* Diersen knew from the beginning of the litigation that there were potential defendants other than the CCE and could have proposed adding these defendants at an earlier juncture. Similarly, he was (or ought to have been) aware of the issues that he sought to raise in his amended complaint, to wit, the validity of the NHTSA exemption for older cars and the question of whether the CCE waived that exemption.[7] In short, the amendments proposed by Diersen *after the judgment was entered* could and should have been suggested by him much earlier in the litigation.[8] Moreover, had the judge

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[7] As discussed below, the "waiver" argument is moot in light of our holding, *supra*, that the NHTSA regulation was invalid. One cannot waive a provision that is invalid as a matter of law.

[8] The only explanation Diersen offered for not proposing these amendments sooner was the alleged unwillingness of his former attorneys to name any defendant other than the CCE. We do not find this a compelling excuse. So long as these former attorneys were duly engaged by Diersen, they were his agents and he must be bound by their decisions concerning trial strategy, whether those decisions be good, bad, or indifferent. *See, e.g., United States v. 7108 W. Grand Ave., Chicago, Ill.*, 15 F.3d 632, 634 (7th Cir. 1994), *cert. denied sub nom. Flores v. United States*, ___ U.S. ___, 114 S. Ct. 2691 (1994).

permitted these amendments after the entry of summary judgment, we note that the litigation would have been prolonged and the "public interest in prompt resolution of legal disputes" impaired. *Amendola*, 907 F.2d at 764. For all of these reasons, we conclude that the trial judge did not abuse her discretion in denying the motion to amend (although we add that in the future it would be helpful to this reviewing court if the district judge would state, on the record, his or her reasons for denying a motion to amend).

B. Denial of Diersen's Motion to Reconsider

Diersen also argues that the district judge erred by denying his motion to reconsider, in which he argued that (1) the regulatory exemption for older cars was invalid, or *alternatively*, (2) new evidence showed that the CCE had *waived* the exemption and effectively admitted that it was bound by the disclosure requirements of the Act. For the reasons discussed above, we agree with the first argument set forth in Diersen's motion to reconsider, even though the district judge chose not to address the parties' arguments on this matter. In light of our holding that the regulatory exemption is invalid, we need not discuss Diersen's alternative arguments concerning waiver of the older-car exemption.[9] Diersen's waiver argument is moot because, obviously, one cannot

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[9] Diersen mistakenly argues that he was justified in not introducing the alleged new evidence on the waiver issue earlier because of his attorney's alleged incompetence. We reject this argument. "[A]ttorney's errors and misconduct are attributed to his clients. The clients are principals, the attorney is an agent, and under the law of agency the principal is bound by his chosen agent's deeds." *7108 W. Grand Ave.*, 15 F.3d at 634. "Malpractice, gross or otherwise, may be a good reason to recover from the lawyer but does not justify prolonging litigation against the original adversary." *Id.* at 633.

waive a regulatory exemption that has no force as a matter of law.

IV. CONCLUSION

We hold that the NHTSA was without statutory authority to exempt motor vehicles ten years old or older from the odometer disclosure requirements of the Act. We therefore reverse the district court to the extent that it relied upon this invalid regulatory exemption as a basis for ruling in the CCE's favor. Nevertheless, we agree with the CCE that a rational jury could not find in Diersen's favor with respect to the CCE's alleged intent to defraud, a crucial element of Diersen's claim. Because there is insufficient evidence upon which to base a finding of odometer fraud, the grant of summary judgment in the defendant's favor is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 13, 1997.

Before

Hon. RICHARD A. POSNER, Chief Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

DAVID J. DIERSEN, Plaintiff-Appellant, No. 96-1588 v. CHICAGO CAR EXCHANGE, INC., An Illinois corporation, Defendant-Appellee.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 2543 Suzanne B. Conlon, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant David J. Diersen, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

APPENDIX C

BY TELEFAX

Mr. John H. Strandquist
President
American Association of Motor Vehicle Administrators
4301 Wilson Boulevard, Suite 400
Arlington, VA 22203

Dear Mr. Strandquist:

I have received a copy of the Issue Alert dated April 17, 1997, that you sent to the members of the American Association of Motor Vehicle Administrators concerning the decision of the United States Court of Appeals for the Seventh Circuit in *Diersen v. Chicago Car Exchange*, 110 F.3d 481 (7th Cir. 1997). In that decision, issued on March 31, 1997, the court held that the NHTSA regulation that exempts vehicles ten years old and older from the requirement in 49 U.S.C. Chapter 327 that an odometer disclosure statement be completed when ownership of the vehicle is transferred (49 CFR 580.6(a)(3)) is invalid because Chapter 327 does not authorize exemptions from that requirement. Your Issue Alert noted that you had contacted NHTSA "to determine whether any action is planned to amend the current legislation for odometer disclosure requirements" in light of the *Diersen* decision.

NHTSA has concluded that amending legislation is unnecessary because Congress has already given the agency the authority to exempt vehicles from the disclosure requirements of Chapter 327. Specifically, in section 332 of the FY 1997 Department of Transportation and Related Agencies Appropriations Act, Pub. Law 104-205

(Sept. 30, 1996), Congress provided that "notwithstanding any other provisions of law, the Secretary may use funds appropriated under this Act, or any other subsequent Act, to administer and implement the exemption provisions of 49 CFR 580.6 and to adopt or amend exemptions from the disclosure requirements for any class or category of vehicles that the Secretary deems appropriate."

In light of the fact that Congress has now authorized NHTSA to expend funds to adopt or amend exemptions from the disclosure requirements, the agency has concluded that the most expeditious way to resolve the uncertainty caused by the *Diersen* decision is to publish a final rule repromulgating all of the exemptions currently contained in 49 CFR 580.6 under the statutory authority of section 332 of P. L. 104-205. Because the current situation can cause problems, such as confusion about whether or not an odometer disclosure statement is required when an older vehicle is transferred, inappropriate rejection of title applications and other delays in the titling process, particularly for vehicles transferred into states within the Seventh Circuit, we plan to make this final rule effective immediately upon publication in the *Federal Register*.

So that your members and others may have prompt access to information about actions NHTSA is taking in response to the *Diersen* decision, the agency plans to post this letter, the *Federal Register* notice and any other relevant information on its World Wide Web site, which is accessible on the Internet at *http://www.nhtsa.dot.gov/new*. We will also provide you with a copy of the *Federal Register* notice as soon as it is available.

I hope this information is helpful. If you have any further questions on this matter, please contact Eileen Leahy, an attorney on my staff, at 202-366-5263.

Sincerely,
John Womack
Acting Chief Counsel
5/28/97